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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1934

No. 247

CENTRAL VERMONT TRANSPORTATION COMPANY,

Petitioner,

vs.

HARRY N. DURNING, COLLECTOR OF CUSTOMS OF THE PORT OF NEW YORK.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF.

HORACE H. POWERS,
Counsel for Petitioner.

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No. 247

CENTRAL VERMONT TRANSPORTATION COMPANY,

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vs.

HARRY N. DURNING, COLLECTOR OF CUSTOMS OF THE PORT OF NEW YORK.

PETITION FOR WRIT OF CERTIORARI.

MAY IT PLEASE THE COURT:

The petition of Central Vermont Transportation Company respectfully shows to this Honorable Court:

Statement of Facts and Matters Involved.

On the 15th day of May, 1933, this action was commenced in the District Court for the Southern District of New York to permanently enjoin the Collector of Customs of the Port of New York from seizing and forfeiting under Section 27 of the Merchant Marine Act of 1920, merchandise transported by it.

On the 28th day of July, 1933, Honorable Frank J. Coleman, United States District Judge, made an order in favor of your petitioner, granting an injunction *pendente lite* and denying the defendant's motion to dismiss the bill of complaint.

The defendant appealed from this order to the United States Circuit Court of Appeals for the Second Circuit which handed down a decision on the 11th day of June, 1934, modifying the order appealed from by reversing that part of the order which granted an injunction, and dismissing the appeal from that part of the order denying the motion to dismiss the bill of complaint. Both the District Court and the Circuit Court of Appeals delivered opinions, copies of which are set forth in the record.

Your petitioner, Central Vermont Transportation Company, was incorporated under the Laws of the State of Maine in 1908 and its stock, except directors' qualifying shares, was owned by Central Vermont Railway Company, the stock of which was in turn owned by the Grand Trunk Railway Company, a Canadian corporation. In 1909, your petitioner purchased two vessels, the "New York" and the "New London", which were built in the United States and documented under the laws of the United States, and has continuously operated them between New York and New London. In 1923, Canadian National Railway Company, a Canadian corporation, acquired the Grand Trunk Railway Company. In 1929, the Central Vermont Railway, Inc., acquired the property of Central Vermont Railway Company, and the Canadian National Railway Company acquired all of the stock, except directors' qualifying shares, of Central Vermont Railway, Inc.

Your petitioner and Central Vermont Railway, Inc., or its predecessor, Central Vermont Railway Company, have been continuously engaged since 1909 in the transportation of freight, as common carriers, partly by railroad

and partly by water, under common control for a continuous carriage between points in the States of Connecticut, Massachusetts, Vermont and New York City, and return, by rail and by water, as well as merchandise originating at points in the Western States which is routed over Canadian rail lines, and thence over Central Vermont Railways and your petitioner, its connecting water carrier. All of the merchandise transported in your petitioner's vessels between points in the United States is transported over a whole or a part of a through route recognized by the Interstate Commerce Commission for which route tariffs have been filed with the Commission and such through route is in part over Canadian rail lines.

The Interstate Commerce Commission duly granted authority to Canadian National Railway Company to own the stock of Central Vermont Railway, Inc., as well as authority to Central Vermont Railway, Inc., to own the stock of petitioner, and declared such ownership and operation to be in the public interest. About one-third of all the freight carried in petitioner's vessels is received from or destined to points in New England.

The merchandise involved in this suit moved by railroad from St. Albans, Vermont, over the Central Vermont Railway, Inc., to New London, Connecticut, and thence in one of your petitioner's boats to New York City, which transportation from St. Albans to New York is on a part of a through route, and while the merchandise was in the possession of petitioner under a through bill of lading, it was seized by the Collector for forfeiture under Section 27 of the Merchant Marine Act of June 5, 1920. Your petitioner's vessels neither receive nor carry any merchandise for local shipment between New York and New London, Connecticut, but only such merchandise as is destined to or received from inland railroad points.

Reasons for Granting the Writ.

1. The question involved in this case is one of Federal law, which has not, but should be settled by this Court.

2. The ruling of the Circuit Court of Appeals, if allowed to stand, will have far reaching effect. It will sanction two different governmental agencies controlling the same business causing a conflict of jurisdiction between the Interstate Commerce Commission and the United States Shipping Board in respect of a common carrier by water in common management and control with a railroad. The petitioner in this case is a common carrier by water, all of whose stock, except the qualifying shares, is owned by a common carrier railroad. The decision of the United States Circuit Court of Appeals is that Section 27 of the Merchant Marine Act of 1920 (Act of June 5, 1920, 41 Stat. 999, 46 U. S. Code, paragraph 883) is addressed to such a common carrier by water. Section 27 is but a part of a comprehensive statute regulating common carriers by water, prescribing prohibitions as to rates for transportation, rebates, equality of treatment to shippers and the like, and confiding exclusive regulatory jurisdiction over such common carriers by water to the United States Shipping Board (Act of June 5, 1920, 41 Stat. 988-1088, 46 U. S. Code, paragraphs 861-889, inclusive).

U. S. Navigation Co. v. *Cunard S. S. Co.*, 284 U. S. 474.

If Section 27 of the Merchant Marine Act of 1920 applies to this petitioner, the whole Act applies to this petitioner. The result is a duplicate system of regulation and a hopeless conflict of jurisdiction over this petitioner between the Interstate Commerce Commission and the United States Shipping Board.

3. The decision of the United States Circuit Court of Appeals produces a drastic curtailment of the jurisdiction of the Interstate Commerce Commission over common carriers by water which are in common management and control with a railroad. The decisions of this Honorable Court have been uniform that "the transportation of * * * property * * * partly by railroad and partly by water when both are used under a common control, management or arrangement for a continuous carriage or shipment * * *" (Act to Regulate Commerce, as amended, 41 Stat. 474, 49 U. S. Code, paragraph 1, Section 1) is a subject matter within the exclusive jurisdiction of the Interstate Commerce Commission and that Act to Regulate Commerce.

Chicago, R. I. & P. Ry. v. *U. S.*, 274 U. S. 29, at pages 35 and 36.

I. C. C. v. *Goodrich*, 224 U. S. 194.

The decision of the United States Circuit Court of Appeals in the instant case denies this proposition and defeats the exclusive jurisdiction of the Interstate Commerce Commission as announced by this Honorable Court.

4. The decision of the United States Circuit Court of Appeals does violence to the declared protective purpose of the Transportation Act of 1920 (41 Stat. 499, 49 U. S. Code, paragraph 142), which is:

> "It is declared to be the policy of Congress to promote, encourage and develop water transportation, service and facilities in connection with the commerce of the United States, and to foster and preserve in full vigor both rail and water transportation."

The decision of the United States Circuit Court of Appeals destroys a common carrier by water and breaks up a rail-water transportation which has the indorsement of

the Interstate Commerce Commission in violation of the declared Congressional intent to preserve them "in full vigor".

5. The decision of the United States Circuit Court of Appeals breaks up a so-called differential through route between Chicago and Detroit in Central Freight Association territory, and New York City in Eastern territory, thereby lessening the transportation opportunities of the shipping public. This service has been in effect for many years and has been of great advantage to the shipping public. The Interstate Commerce Commission has found this service to be in the public interest.

Re Central Vermont Railway, 158 I. C. C. 397.

The destruction of such a through route is a matter of national concern which justifies a review by this Honorable Court.

6. The decision of the United States Circuit Court of Appeals denies to your petitioner the right to handle one-third of its entire traffic, thereby raising a serious question of confiscation of property under the Constitution of the United States. The effect of this decision on petitioner and its parent company, Central Vermont Railway, Inc., is so grave that this Honorable Court should review that decision.

7. It is of great public importance that a uniform and reasonable rule should be laid down by this Honorable Court defining the respective jurisdictions of the Interstate Commerce Commission and the United States Shipping Board.

Prayer for Writ.

WHEREFORE your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Circuit

Court of Appeals for the Second Circuit, commanding that court to certify and to send to this Court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket number E. 76, page 38, Central Vermont Transportation Company against Harry M. Durning, Collector of Customs at the Port of New York, and that the said decision of the said Court of Appeals be reversed by this Honorable Court and that your petitioner have such other and further relief in the premises as to this Honorable Court may seem meet and just, and your petitioner will ever pray.

CENTRAL VERMONT TRANSPORTATION COMPANY,
By E. DESCHENES,
Vice-President.

HORACE H. POWERS,
Counsel for Petitioner.

STATE OF VERMONT,
County of Franklin, ss:

E. Deschenes, being duly sworn, says:

I am the Vice-President of Central Vermont Transportation Company, a corporation duly organized under the Laws of the State of Maine, the petitioner herein; and I have knowledge of this litigation. The foregoing petition and the matters therein set forth are true, to the best of my knowledge, information and belief.

E. DESCHENES.

Subscribed and sworn to before me this 27th day of July, 1934.

[NOTARIAL SEAL.] VIRGINIA M. BROWN,
Notary Public.

I certify that I have examined the foregoing petition; that in my opinion it is well founded and entitled to the favorable consideration of the Court and that it is not filed for the purpose of delay.

HORACE H. POWERS,
Counsel.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1934

No. 247

CENTRAL VERMONT TRANSPORTATION COMPANY,

Petitioner,

vs.

HARRY N. DURNING, COLLECTOR OF CUSTOMS OF THE PORT OF NEW YORK.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

The Opinions of the Courts Below.

The learned District Judge handed down an opinion which appears in the record on appeal at page 23.

The Circuit Court of Appeals for the Second Circuit handed down an opinion which appears in the record on appeal at page 37.

II.

Jurisdiction.

The date of the decision to be reviewed is June 11th, 1934. This Honorable Court has the right to grant the writ and review the case. Judicial Code, Sect. 240, as amended by the Act of February 13, 1925, 43 Stats. 938; *Harriman* v. *Northern Securities Company*, 197 U. S. 244.

III.

Statement.

The material facts and questions involved are set forth in the foregoing petition.

IV.

Specifications of Error.

1. The learned Circuit Court of Appeals for the Second Circuit erred in deciding to reverse the order of the District Court granting an injunction *pendente lite*.

2. The learned Circuit Court of Appeals erred in holding that the prohibitions of Section 27 of the Merchant Marine Act apply to petitioner or to any merchandise transported by it.

3. The learned Circuit Court of Appeals erred in holding that the proviso contained in Section 27 of the Merchant Marine Act does not expressly except petitioner's shipments.

4. The learned Circuit Court of Appeals erred in holding that Section 27 of the Merchant Marine Act does not violate the rights granted to petitioner by the Fifth Amendment to the Federal Constitution.

V.

ARGUMENT.

Point A.

The Merchant Marine Act, by its own terms, makes Section 27 inapplicable to this petitioner.

Section 33 of the Shipping Act, as amended by the Merchant Marine Act, reads in part as follows:

> "This chapter shall not be construed to affect the power or jurisdiction of the Interstate Commerce

> Commission, nor to confer upon the (Shipping) Board concurrent power or jurisdiction over any matter within the power or jurisdiction of such Commission; * * *" (46 U. S. Code, par. 833).

The Circuit Court of Appeals held that the subject matter of Section 27 was not a matter within the "jurisdiction of the Interstate Commerce Commission" and consequently that section was not affected by the exception above recited.

The prohibitions of Section 27, so far as material here, are addressed to the ownership of boats operating in the trade named in the section. In case of a corporation, Section 27 read in connection with Section 2 of the Shipping Act (46 U. S. Code, par. 802) prescribes the ownership of the stock of the corporation owning the boats. It thus becomes clear that Section 27, read in connection with Section 2 of the Shipping Act, is addressed to the questions (1) who may own the boats engaged in the service named and (2) who may own the stock of such owning corporation. The question is whether that jurisdiction had been given to the Interstate Commerce Commission prior to the enactment of the Merchant Marine Act in 1920?

The Panama Canal Act of August 24, 1912 (49 U. S. Code, Par. 5, Sections 10 and 12), reads in part as follows:

> "It shall be unlawful for any railroad company * * * to own, lease, operate, control or have any interest whatsoever (by stock ownership or otherwise, either directly, indirectly, through any holding company or by stockholders or directors in common, or in any other manner) in any common carrier by water * * *. If the Interstate Commerce Commission shall be of the opinion that any such existing specified service by water * * * is being operated in the interest of the public and is of advantage to the

> convenience and commerce of the people, * * * the Interstate Commerce Commission may by order, extend the time during which such service by water may continue to be operated beyond July 1, 1914."

Section 2 of paragraph 5 of the Interstate Commerce Act (49 U. S. Code, par. 5(2)) reads in part as follows:

> "Whenever the Commission is of opinion, after hearing, upon application of any carrier or carriers engaged in the transportation of passengers or property subject to this chapter, that the acquisition * * * by one of such carriers of the control of any other such carrier or carriers either under a lease or by the purchase of stock * * * will be in the public interest, the Commission shall have authority by order to approve and authorize such acquisition * * *."

It is admitted that petitioner and its parent company, Central Vermont Railway, Inc., are both common carriers subject to the Interstate Commerce Act, and that they both come within the scope of the two statutes above described. It is admitted that the ownership of these boats and the operation thereof by your petitioner has been approved by the Interstate Commerce Commission.

Re Central Vermont Boat Lines, 40 I. C. C. 589.

It is admitted that the ownership of the stock of your petitioner by Central Vermont Railway, Inc., has been approved by order of the Interstate Commerce Commission.

It is admitted that the ownership of the stock of Central Vermont Railway, Inc., by Canadian National Railway Company has been approved by order of the Interstate Commerce Commission.

Re Central Vermont Railway, 158 I. C. C. 397.

It appears clearly, therefore, that prior to the passage of the Shipping Act and the Merchant Marine Act, the

ownership of boats by a common carrier, and the ownership of its stock by a railroad were both matters confided to the exclusive jurisdiction of the Interstate Commerce Commission. The Commission, acting under its exclusive jurisdiction, has approved the operation by your petitioner and the ownership of its stock.

These questions of the operation of this boat line by your petitioner and the ownership of its stock came under the jurisdiction of the Interstate Commerce Commission prior to the passage of the Shipping Act and the Merchant Marine Act. Consequently, under Section 33 of the Shipping Act, neither that Act nor the Merchant Marine Act have any application to your petitioner or to the ownership of its stock.

POINT B.

The proviso contained in Section 27 of the Merchant Marine Act expressly excepts petitioner's shipments.

(1)

The proviso reads:

> "Provided, that this section shall not apply to merchandise transported between points within the Continental United States * * * over through routes recognized by the Interstate Commerce Commission for which routes rate tariffs have been or shall be filed with said Commission when such routes are in part over Canadian Rail Lines and their own or other connecting water facilities."

Petitioner and Central Vermont Railway, Inc., and Canadian National Railway Company (or the predecessors of the latter two railroads) had constituted a duly authorized through route between New York and Western States for many years prior to the enactment of Section 27 of the Merchant Marine Act. It is urged that Congress did not

intend to disturb the flow of traffic on this route; or make it illegal to carry merchandise from New England points to New York, while legal to carry merchandise from Western States to New York. The purpose of the proviso was to cover all merchandise transported over the whole or any part of the route.

The effect of the decision of the Court of Appeals is to read into the statute the words "when such *transportation* is in part over a Canadian Rail Line" while the statute reads "when such *routes* are in part over a Canadian Rail Line".

The learned Court of Appeals thought that if the interpretation claimed by petitioner was adopted the purpose of Congress might be evaded by the simple expedient of filing tariffs showing participation in routes exempted by the proviso.

Congress had already given control to the Interstate Commerce Commission of water lines operated by railroads only where the Commission determined that such operation was in the public interest. Thus, Congress granted authority to the Interstate Commerce Commission only over water lines connected with railroads and the proviso exempts only merchandise transported on such water lines constituting a part of a through route when operated in connection with Canadian Rail Lines.

(2)

The decision of the Circuit Court of Appeals overthrows a settled administrative construction.

For more than twelve years, petitioner had engaged in the now condemned transportation without molestation. Since the statute is highly penal and one which disturbs vested rights, it should be given the strictest construction and one that accords with the administrative construction. *Prussian* v. *U. S.*, 282 U. S. 675.

Point C.

The Merchant Marine Act is a comprehensive statute designed to regulate common carriers by water which are unconnected with railroads.

Section 27 of the Merchant Marine Act is but a part of a comprehensive plan to regulate and supervise certain common carriers by water. In order to determine the legal effect of Section 27, the whole Act, of which that section is a part, must be read.

The Merchant Marine Act and the Act to Regulate Commerce, each in its own field, are designed to regulate two classes of common carriers. This was settled by this Honorable Court in *U. S. Navigation Company* v. *Cunard S. S.*, 284 U. S. 474, where Mr. Justice Sutherland said, in part, at pages 480-481:

> "The Shipping Act is a comprehensive measure bearing a relation to common carriers by water substantially the same as that borne by the Interstate Commerce Act to interstate common carriers by land. * * * In its general scope and purpose, as well as in its terms, that Act closely parallels the Interstate Commerce Act; and we cannot escape the conclusion that Congress intended that the two Acts, each in its own field, should have like interpretation, application and effect."

A comparison of the certain provisions of the Shipping Act as amended by the Merchant Marine Act and the Act to Regulate Commerce shows conclusively that each Act is intended to be supreme in its own field.

Merchant Marine Act.	*Act to Regulate Commerce.*
Sections 16 and 17 of the Shipping Act (46 U. S. Code, pars. 815 and 816) prohibit discriminatory acts and rates by common carriers to their shippers.	Sections 2 and 3 (49 U. S. Code, pars. 2 and 3) prohibit discriminatory acts and rates by common carriers to their shippers.

Section 18 of the Shipping Act (46 U. S. Code, par. 817) requires carriers to file reasonable maximum rates with the Board, and charge only such rates for service as are filed, unless the Board shall otherwise direct.	Sections 1 and 6 (49 U. S. Code. pars. 1 and 6) provide, among other things, that the carriers must file tariffs showing their charges for services which must be reasonable, and must not be departed from except upon notice to the Commission.
Section 20 of the Shipping Act (46 U. S. Code, par. 819) prohibits the disclosure by the carrier of confidential information injurious to a shipper without his consent.	Section 15, paragraph 11 (49 U. S. Code, par. 15 (11)), prohibits the disclosure by the carrier of confidential information injurious to a shipper without his consent.
Section 21 of the Shipping Act (46 U. S. Code, par. 820) requires the filing of such reports by the carrier as the Board may prescribe and provides penalties for failure to file and for false statements.	Section 20 (49 U. S. Code 20) requires the filing of an annual report by the carrier in such form as the Commission may direct and provides penalties for failure to file and for false statements.
Section 15 of the Shipping Act (46 U. S. Code, par. 814) provides that traffic contracts between carriers subject to the Act shall be filed with the Board.	Section 6, par. 5 (49 U. S. Code, par. 6 (5)), provides that all traffic contracts between two carriers subject to the Act shall be filed with the Commission.
Section 22 of the Shipping Act (46 U. S. Code, par. 821) provides for complaints against carriers for violations of the Act and for the award of reparation by the Board if damage is proved.	Section 9 (49 U. S. Code, par. 9) provides that any one injured by violations of the Act by a carrier may file complaint for reparation with the Commission or bring suit in the United States Court, at his election.
Sections 27 and 28 of the Shipping Act (46 U. S. Code, pars. 827 and 828) provide for the production of books and papers, the attendance of witnesses before the Board, and the immunity of witnesses.	Section 12 (49 U. S. Code, par. 12) provides for the production of books and papers, and the attendance of witnesses before the Commission. Section 1 (49 U. S. Code, par. 47) provides for the immunity of witnesses.

Section 3 of the Shipping Act (46 U. S. Code, par. 804) creates the United States Shipping Board and gives it its general grant of jurisdiction over the matters within the Merchant Marine Act.

Section 11 (49 U. S. Code, par. 11) creates the Interstate Commerce Commission and gives it its general grant of jurisdiction over the matters within the Act to Regulate Commerce.

From the above comparison, it will be seen that the Congress has set up two independent systems of regulation of different kinds of carriers. The Shipping Act and the Merchant Act have the exclusive regulation of one class and the Interstate Commerce Act has the exclusive regulation of the other. As was tersely stated by this Court in *U. S. Navigation Co.* v. *Cunard S. S. Co.* (*Supra*), Congress intended that the two jurisdictions should be complete and exclusive, "each in its own field".

Section 27 is but a part of the Shipping Act as amended by the Merchant Marine Act. If Section 27 applies to this petitioner, the whole Act, of which it is a part, applies to this petitioner. The result of such a construction is a duplication of regulation over this petitioner, a divided allegiance by this petitioner, hopeless chaos in a field of regulation where order is essential.

Fortunately, this Court has seen the difficulties presented by this claim of the United States and has decided which carriers are to be governed by which Act.

In *Chicago, R. I. Ry.* v. *U. S.*, 274 U. S. 29, this Court held that where a water line is in common management and control with an interstate railroad, the water line is within the exclusive jurisdiction of the Interstate Commerce Act.

In *U. S.* v. *Munson S. S. Line*, 283 U. S. 43, this Court held that when the water line is wholly divorced from a railroad, the water line is within the exclusive jurisdiction of the Merchant Marine Act.

It must follow, therefore, that because this petitioner is a water line in common management and control with a railroad, this petitioner is within the exclusive coverage of the Interstate Commerce Act. The Merchant Marine Act, Section 27 included, has no application to this petitioner under the decisions of this Court.

POINT D.

The proviso of Section 27 exempts the transportation of property between New England points and New York City.

The proviso in Section 27 (U. S. Code, par. 883) exempts the transportation of merchandise over through routes when such routes "are in part over Canadian rail lines" with other requirements which have admittedly been complied with. The claim of your petitioner is that the transportation of property between New England points and New York is made over a "Canadian rail line" with its "connecting water facilities" within the meaning of this statute.

Your petitioner is a Maine corporation whose stock is owned by Central Vermont Railway, Inc., which is a Vermont corporation. The stock of this last named corporation is owned by Canadian National Railway Company, a Canadian corporation.

The argument of the United States is that neither your petitioner nor its parent, Central Vermont Railway, Inc., can qualify under Section 2 of the Shipping Act (46 U. S. Code, par. 802), as a citizen of the United States because of the ownership of the stock of the latter by Canadian National Railway Company. Let us assume that this argument is sound. Let us assume that under this statute a corporation takes the citizenship of its stockholders and not its State of organization.

It is too late to argue that a corporation is not a "person".

McGaskill Co. v. *U. S.*, 216 U. S. 504.
Donnell v. *Herring-Hall, etc. Co.*, 208 U. S. 267.

As a person, a corporation, if it lawfully exists, must have a domicile and a nationality.

Shaw v. *Quincy etc. Co.*, 145 U. S. 444.
In Re Keasbey, 160 U. S. 221.
Galveston, etc. Ry. Co. v. *Gonzales*, 151 U. S. 496.

Under ordinary rules, your petitioner, incorporated in Maine, would be domiciled there and a citizen of that State. Petitioner's parent company, incorporated in Vermont, would be domiciled there and a citizen of that State. But, it is claimed, under Section 2 of the Shipping Act a corporation takes the domicile and citizenship of its stockholders and not its State of incorporation.

Giving this argument its full force, it proves that Central Vermont Railway, Inc. is a citizen of and domiciled in Canada because its stock is owned there. If Central Vermonth Railway is a citizen of Canada, as is asserted by the Government, within the meaning of this law, it is a "Canadian rail line" within the meaning of that same law. If this last is true, merchandise moving over Central Vermont Railway from New England points is moving "over a Canadian rail line" within the meaning of the proviso in Section 27, and is exempt from the operation of that section.

Point E.

Section 27 of the Merchant Marine Act, as construed by the United States, violates the rights of this petitioner guaranteed by the Fifth Amendment to the Constitution of the United States.

The undisputed facts show: that your petitioner was incorporated under the laws of Maine in 1908 and became an American citizen under any law which existed at that

time. Petitioner's stock at that time was acquired by Central Vermont Railway Company, whose stock was then owned by Grand Trunk Railway Company of Canada. Petitioner legally acquired the boats "New London" and "New York" and commenced operation of them as a part of Central Vermont Railway Company property in 1909. All this was lawful at the time and petitioner was an American citizen entitled to the guaranties provided by law. The boats, it is undisputed, were and are suitable only for operation on a protected waterway like Long Island Sound and were designed for operation in connection with a railroad. The result is that petitioner, as an American citizen, made its investment for this particular operation in strict conformity with the laws of the United States.

The Shipping Act of 1916 and the Merchant Marine Act of 1920, if given the construction advocated by the Government, deprive petitioner of its citizenship and deprive petitioner of a substantial use of its property. Whereas petitioner was a citizen of the United States prior to those Acts, it is no longer such under the definition of the word "citizen" in those Acts. Those two Acts, it is contended, prohibit the carriage of certain railroad freight amounting to a total of 33 per cent of petitioner's tonnage. Such a Legislative Act is not regulation, but deprivation of property.

It is admitted by your petitioner that its property is subject to reasonable regulation. But this Honorable Court, long ago, settled the proposition that regulation of public utilities cannot go beyond the reasonable bounds.

> "As the public power to regulate railways and the private ownership of such property co-exist and do not the one destroy the other, it has been settled that the right of ownership of railway property like other property rights finds protection in constitutional guaranties, and, therefore, whenever the power of regula-

> tion is exerted in such an arbitrary and unreasonable way as to cause it to be in effect not regulation but an infringement upon the right of ownership, such an exertion of power is void because repugnant to the due process and equal protection clauses of the Fourteenth Amendment."
>
> *Atlantic Coast Line* v. *North Carolina Corp. Commission,* 206 U. S., 1 at 20.

Similar arbitrary action by the Federal Government would violate the Fifth Amendment.

Hibben v. *Smith,* 191 U. S. 325.

French v. *Barber,* 151 U. S. 329.

The Constitutional guaranties are not limited to a taking of title by the Federal Government, but prohibit a deprivation of the use of property.

> "Confiscation may result from a taking of the use of property without compensation quite as well as from the taking of title."
>
> *Chicago, R. I. & P. Ry.* v. *U. S.,* 284 U. S., 80 at 96.

When your petitioner made its investment, your petitioner was an American citizen under the laws of that country. Your petitioner acquired valuable property suitable only for operation on Long Island Sound or some other protected waterway. Your petitioner thereby consented to future regulation of it and its property, but it did not consent, nor could it foresee, that the Congress would assume to deprive your petitioner of its American citizenship and deprive it of the only possible use of its property. The construction of Section 27 claimed by the United States is that a statute may be passed by Congress depriving an American citizen of his citizenship and prohibiting that citizen from using his property in a lawful business. Such attempts against the person and the prop-

erty are so shocking that they must be within the prohibitions of the Fifth Amendment. Your petitioner in 1909, when its money was invested, could foresee and consented to future regulation, but no amount of prediction could envisage that your petitioner would be stripped of its citizenship, without fault on its part, and prohibited from engaging in the lawful business of transportation.

This is not one of the cases where the whole business becomes illegal. When the people ostracize an entire industry, the operator in that trade suffers no recoverable loss.

Everard Breweries, 265 U. S. 545.
Ruppert v. *Caffey*, 251 U. S. 264.
Mugler v. *Kansas*, 123 U. S. 623.

In this case, the business involved is transportation which is a lawful business. Your petitioner has been excluded from that business which is of unquestioned legality today.

Courts must be alert to see through any attempts to deprive American citizens of their guaranteed rights. No matter how noble may be the motive, no matter how desirable may be the result, if the attempted Congressional action is prohibited, it must fail. The Congress, even though acting under the guise of Constitutional authority, cannot do an act prohibited by that document.

Schollenberger v. *Penn.*, 171 U. S. 1.

This Honorable Court has had occasion to point out the limits of Constitutional action by the Congress, and has said:

> "It must never be forgotten that while the State may regulate with a view to enforcing reasonable rates and charges, it is not the owner of property of public utility companies, and is not clothed with general power of management incident to ownership."
>
> *So. Bell Co.* v. *Public Service Commission*, 262 U. S. 276, at 288.

This Honorable Court has declared invalid various attempts by the States to push regulation beyond reasonable bounds. Thus a law which attempted to keep upper berths on a Pullman car closed until sold when the lower berth was occupied, was declared an unconstitutional invasion of property.

Chicago, M. & St. P. R. R. v. *Wisconsin*, 238 U. S. 491.

Again, when a carrier had held itself out to be a carrier of passengers only, it could not be compelled to carry freight.

Northern Pacific Ry. v. *North Dakota*, 236 U. S. 585, 595.

This led the Court in *Oregon* v. *U. S.*, 47 F. (2) 250 to hold that a railroad cannot be compelled to extend the use of its property beyond the scope of that originally assumed. If it be unlawful to require a carrier to enlarge its activities, it must be equally prohibited to require a carrier to curtail one-third of its activity when ruin to the carrier will result. The carrier, to survive, must have the fullest use of its alloted corporate franchise, subject to reasonable regulation. But to deprive a carrier of one-third of the use of its franchise and investment goes beyond anything ever attempted by Congress or authorized by this Honorable Court.

The Government has been denied the right to interfere with the elimination of unprofitable trains because of the invasion of the use of the carrier's property.

Miss. R. R. Comm. v. *M. and C. R. R.*, 244 U. S. 388.

Your petitioner's position, when stripped of its citizenship and one-third of its business is much more pathetic than that of the carrier which this Honorable Court protected in the cited case.

The Constitution protects the carrier against the imposition of unreasonably low rates.

So. Bell Co. v. *Public Service Commission*, 262 U. S. 276.

Denver, etc., v. *U. S.*, 57 F. (2) 735.

It must be that if your petitioner is protected in that respect, it is also protected against the seizure by the Congress of one-third of all its traffic.

In the cases reviewed, a substantial interference with the business of the carrier is shown. But in no case is the result of the Congressional interference so grave as in your petitioner's case. The attempted Congressional action in your petitioner's case is much more disastrous than any of the prohibited acts in the cases cited. If Section 27, as construed by the United States, receives judicial sanction, your petitioner must perish.

Mr. Justice Bradley said in *Boyd* v. *United States*, 116 U. S. 616, at 635:

> "It is the duty of courts to be watchful for the Constitutional rights of the citizen, and against any stealthy encroachments thereon."

Your petitioner has the faith to believe and the courage respectfully to argue that this Honorable Court will not permit the Congress to deprive your petitioner of its American citizenship, confiscate one-third of its corporate business, and thus pronounce your petitioner's death sentence.

It follows, therefore, that the Circuit Court of Appeals for the Second Circuit erred, and it is respectfully submitted that this case is one calling for the exercise by this

Court of its supervisory powers to such end that a writ of certiorari should be granted, and that this Court should review the decision of the Circuit Court of Appeals.

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